

FEDERAL ENERGY REGULATORY COMMISSION  
Washington, D.C. 20426

January 11, 2007

In Reply Refer To:  
El Cap II, LLC  
Docket Nos. ER03-985-001  
EL06-107-000

El Cap II, LLC  
Gustav H. Beerel  
One Memorial Drive  
Cambridge, Massachusetts 02142

Dear Mr. Beerel:

1. In this order, the Commission accepts the updated market power analysis filed by El Cap II, LLC (El Cap) in response to the Commission order issued on October 6, 2006.<sup>1</sup> This order also directs certain compliance filings, as discussed below.
2. This order also terminates the section 206 proceeding instituted in Docket No. EL06-107-000 with regard to El Cap.
3. Notice of El Cap's filing was published in the *Federal Register*, 71 Fed. Reg. 66,322 (2006), with interventions or protests due on or before November 20, 2006. None was filed.
4. As a condition of receiving market-based rate authority, the Commission requires market-based rate sellers to submit an updated market power analysis every three years<sup>2</sup> to allow the Commission to evaluate the reasonableness of their charges and to provide for ongoing monitoring of their ability to exercise market power. In the absence of an updated market power analysis, the Commission cannot exercise its statutory duty to

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<sup>1</sup> *ACN Utility Services, Inc., et al.*, 117 FERC ¶ 61,027 (2006) (October 6 Order).

<sup>2</sup> *See, e.g., W. Res., Inc.*, 94 FERC ¶ 61,050, at 61,247 (2001); *Entergy Services, Inc.*, 58 FERC ¶ 61,234, at 61,760 (1992); *PSI Energy, Inc.*, 51 FERC ¶ 61,367, at 62,209 (1990).

ensure that market-based rates are just and reasonable and that market-based rate sellers continue to lack the potential to exercise market power so that market forces are in fact determining the price.

5. In the October 6 Order, the Commission directed El Cap, which had failed to comply with the requirement to submit an updated market power analysis, to file its updated market analyses within 60 days from the issuance of that order or provide satisfactory support for why it should not be required to do so. The Commission also established a refund effective date pursuant to the provisions of section 206 of the Federal Power Act (FPA) for the protection of customers.<sup>3</sup> In the October 6 Order, the Commission also gave El Cap the option to file a notice of cancellation, instead of filing the updated market power analysis or providing support as to why it should not be required to do so.

6. On October 30, 2006, El Cap filed an updated market power analysis within the timeline prescribed in the October 6 Order. We herein accept El Cap's updated market power analysis and terminate the section 206 proceeding instituted in Docket No. EL06-107-000 with regard to El Cap, as discussed below.

7. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission, and cannot erect other barriers to entry. The Commission also considers whether there is evidence of affiliate abuse or reciprocal dealing.<sup>4</sup>

8. El Cap states that neither it nor any of its affiliates owns or controls any generation. Accordingly, based on El Cap's representations, we find that El Cap satisfies the Commission's generation market power standard.

9. El Cap states that neither it nor any of its affiliates owns or controls any transmission facilities. Accordingly, based on El Cap's representations, we find that, El Cap satisfies the Commission's transmission market power standard.

10. El Cap states that it cannot erect barriers to entry into wholesale power markets. El Cap also states that neither it nor any of its affiliates owns or controls any natural gas distribution facilities or natural gas pipelines. Further, no intervenor has raised concerns

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<sup>3</sup> 16 U.S.C. § 824e (2000).

<sup>4</sup> See, e.g., *Progress Power Mktg., Inc.*, 76 FERC ¶ 61,155, at 61,919 (1996); *Northwest Power Mktg. Co.*, 75 FERC ¶ 61,281, at 61,899 (1996); accord *Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223, at 62,062-63 (1994).

regarding barriers to entry. Based on El Cap's representations, the Commission is satisfied that EL Cap cannot erect barriers to entry.

11. El Cap states that it is not affiliated with any entity with a franchised service territory. No intervenor has raised affiliate abuse concerns. Based on El Cap's representations, we find that El Cap satisfies the Commission's concerns with regard to affiliate abuse.

12. We find that EL Cap satisfies the Commission's directive in the October 6 Order and meets the requirements for continued market-based rate authorization. We will therefore terminate the section 206 proceeding instituted in Docket No. EL05-107-000 with regard to El Cap.

13. El Cap failed to revise its market-based rate tariff to include the change in status reporting requirement adopted by the Commission in Order No. 652.<sup>5</sup> Accordingly, we direct El Cap, within 30 days of the date of issuance of this order, to revise its market-based rate tariff to incorporate the following provision, without variation, consistent with Order No. 652:

[insert market-based rate seller name] must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority. A change in status includes, but is not limited to, each of the following: (i) ownership or control of generation or transmission facilities or inputs to electric power production other than fuel supplies, or (ii) affiliation with any entity not disclosed in the application for market-based rate authority that owns or controls generation or transmission facilities or inputs to electric power production, or affiliation with any entity that has a franchised service area. Any change in status must be filed no later than 30 days after the change in status occurs.

14. Additionally, El Cap does not state that it will not make any sales to any affiliate with a franchised electric service territory "without first receiving" Commission authorization of the transaction under section 205 of the FPA.<sup>6</sup> Therefore, EL Cap is also directed to incorporate such language into its market-based rate tariff within 30 days of the date of this order.

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<sup>5</sup> *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005).

<sup>6</sup> *Aquila, Inc.*, 101 FERC ¶ 61,331 at P 12 (2002).

15. El Cap is required to file Electric Quarterly Reports (EQRs) in compliance with Order No. 2001.<sup>7</sup>

16. El Cap is directed to file an updated market power analysis within three years of the date of this order, and every three years thereafter. The Commission also reserves the right to require such an analysis at any intervening time.

17. In Order No. 664, the Commission stated that it intends to no longer grant waivers of the full requirements of Part 45 of its regulation in its orders granting market-based rate authority. Rather, persons seeking to hold interlocking positions will be required henceforth to comply with the full requirements of Part 45.<sup>8</sup> With respect to an individual who is currently authorized to hold interlocking positions, that individual will not need to refile under the full requirements of Part 45 to continue to hold such interlocking positions (unless and until that individual assumes different or additional interlocking positions).<sup>9</sup> Thus, consistent with Order No. 664, any of the above-captioned entities who previously sought and were granted waiver of the full requirements of Part 45 will be required henceforth to comply with the full requirements of Part 45.

By direction of the Commission.

Magalie R. Salas,  
Secretary.

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<sup>7</sup> *Revised Public Utility Filing Requirements*, Order No. 2001, 67 Fed. Reg. 31,043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002). *See* 18 C.F.R. § 35.10b (2005). Failure to file an Electric Quarterly Report (without an appropriate request for extension), or failure to report an agreement in an Electric Quarterly Report, may result in forfeiture of market-based rate authority, requiring filing of a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

<sup>8</sup> *Commission Authorization to Hold Interlocking Positions*, Order No. 664, 70 Fed. Reg. 55,717 (Sept. 23, 2005), FERC Stats. & Regs. ¶ 31,194, at P 34 (2005), *order denying reh'g and stay*, Order No. 664-A, 114 FERC ¶ 61,142 (2006) (discussing part 45, 18 C.F.R. Pt. 45 (2005)).

<sup>9</sup> *Id.* at P 36.